IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE SIDE

Second Appeal No.1202 of 2005

Shankar Ganpati Salunkhe ..Appellant

vs.

1. Chandrabai Ramchandra More
and others ..Respondents

Shri Kuldeep S.Patil for appellant.
Shri Anilkumar Patil for respondent no.1.

CORAM: S.C.DHARMADHIKARI J.
11th July, 2007

P.C.

1. Heard Shri Patil appearing for the appellant/original defendant no.1 and Shri Anilkumar Patil for respondent no.1. Other respondents are served.

2. The only contention raised by Shri Patil appearing for the appellant to challenge the order passed by First Adhoc Additional District Judge, Sangli on 24th June, 2005 in Reg.Civil Appeal No.108 of 1995 is that in a suit for partition and separate possession although the Court below held that it is necessary to implead all branches, in the instant case, the sisters of the present appellant were not impleaded as parties thereto and, therefore, the suit which was filed by the original plaintiff being Civil Suit No.178 of 1993 is not tenable for non joinder of necessary parties. In absence of necessary parties the legal

consequences are that the decree is not legal, valid and binding but a nullity. In such circumstances, the subject decree ought to have been reversed by the lower Appellate Court.

3. His contention is that the Trial Court has erred in directing enquiry in mesne profits in as much as when respondent no.2 Kesabai has admitted in her deposition that after the death of her husband she has been residing in the suit property then there was no occasion for awarding any mesne profit or ordering any enquiry into the same. This is not a case where the decree for possession being passed in a suit for possession on title, that the mesne profit follows and persons in unauthorised occupation and possession be called upon to pay the same.

4. Both the contentions are devoid of any merit and substance in as much as the Courts below, on the basis of oral and documentary evidence concurrently held that there are two branches; one is of Vithoba and the other is of Ganpati. These branches are represented properly and fully in the subject proceedings. In absence of any material to show that the sisters have been denied their share in the property, the contention of Shri Patil cannot be entertained. The branch of Ganpati to which the appellant and sisters belong has been represented. It is nobody’s case before me that the sisters would be denied

share in the subject property. The suit is, therefore, not bad for non joinder of sisters in the peculiar facts of this case. The lower Appellate Court and the Trial Court were right in answering this issue in favour of the plaintiff and against the present appellant. The suit has been decreed as against Shankar Ganpati Salunkhe. The plaintiffs have been entitled to 1/4th share and defendant nos.3 and 4 are also entitled to some share out of their 1/2 share in the suit property. The branch of Ganpati to which the sisters belong have been held to be entitled to 1/2 share. In other words Vithoba has got 1/2 share in the property and other 1/2 share goes to the branch of Ganpati. The suit property is going to be divided into two parts. The Trial Court has rightly held that if the sisters of defendant nos.1 and 2 are getting share of Ganpati then their branch is represented by impleadment of defendant nos. 1 and 2.

5. As far as enquiry into the mesne profits is concerned, it has been found that the plaintiffs have been deprived of their right to share in the suit property and in fact two ladies, who are senior citizens, have specifically stated before the court below that they were driven out of the property. In such circumstances when a rightful share of their branch which is to go to them in accordance with law and they have been kept out of enjoyment of the same, then I see no reason in the present facts and

circumstances to interfere with the direction with regard to enquiry into the mesne profits. This is also a finding of fact rendered consistent with the oral and documentary evidence on record.

6. In the limited jurisdiction that this Court has been conferred upon by section 100 of the Code of Civil Procedure, it is not possible to once again reappreciate and reappraise the material on record and arrive at a different conclusion. In such circumstances, there is no merit in the second appeal in as much as there is no substantial question of law involved. The second appeal is, therefore, dismissed.

(S.C.DHARMADHIKARI J.)